Berjaya General Insurance Berhad v Goh May Ling

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12 – 49 OF 2005
LOW HOP BING J
28 MARCH 2007

Civil Procedure — Summary Judgment — Triable issues — Execution of satisfaction note by plaintiff — Lapse of 13 months — Whether first defendant released from liability

Insurance Law — Motor insurance — Claims (insurance policy) — Settlement clause — Three options for settlement — Triable issue — Whether exercise of one particular option by the defendant released the first defendant from further liability

The respondent's car was involved in an accident. The vehicle was insured by the appellant (first defendant). Upon assessment of the damage sustained by the appellant (first defendant's) adjuster, the plaintiff sent the car for repairs to the second defendant. Thereafter, the respondent executed a satisfaction note certifying the necessary repairs to the car had been carried out to her satisfaction and payment made to the second defendant by the appellant (first defendant) shall constitute a full release of the claim made under the insurance policy.

Some 13 months later, the car was examined by Puspakom who found that the vehicle did not comply with the Road Transport Act 1987 and was suspected of showing signs of dissection and reconnection. The plaintiff filed a claim against the first and second defendants. The sessions judge entered summary judgment against the appellant. The appellant appealed.

Held, allowing the appeal with costs and costs of the court below and ordering the judgment sum paid to the respondent to be refunded with interest:

(1) The question for determination in this appeal is whether the first defendant had on the substantially undisputed facts as alluded to by way of the parties' affidavits filed herein, raised any triable issue so as to bar the plaintiff from signing summary judgment under O 26A (see para 10).

(2) It is apparent that the first defendant had exercised the option under cl 2(a)(i) above, ie, to pay the cost of repairs to the car and the plaintiff had signified her acceptance of the cost of repairs by executing the satisfaction note (see para 12).

(3) The issues raised for the first defendant are clearly triable issues which are eminently unsuitable for the signing of a summary judgment in favour of the plaintiff (see para 13).

[Bahasa Malaysia summary

Kereta responden (plaintif) telah terlibat dalam satu kemalangan. Kenderaan tersebut telah diinsurankan oleh perayu (defendan pertama). Setelah penilaian terhadap kerosakan oleh penaksir perayu (defendan pertama), plaintif telah menghantar keretanya untuk dibaikpulih kepada perayu kedua. Sesudah itu, responden (plaintif) telah menguatkuasakan nota penyelesaian mengesahkan baikpulih yang perlu terhadap kereta tersebut telah dilakukan dan beliau telahpun berpuas hati serta pembayaran yang dibuat kepada defendan kedua oleh perayu (defendan pertama) memberikan hak perlepasan penuh tuntutan yang dibuat di bawah polisi insuran. Kira-kira 13 bulan kemudian, kereta tersebut telah diperiksa oleh Puspakom yang mendapati kenderaan tersebut tidak mematuhi Akta Pengakutan Jalan 1987 dan disyaki terdapat tanda-tanda diubahsuai dan penyambungan semula. Plaintif telah memfailkan tuntutan terhadap defendan pertama dan defendan kedua. Hakim mahkamah sesyen telah memasukkan Penghakiman Terus terhadap perayu (defendan pertama). Perayu (defendan pertama) telah merayu.

Diputuskan, membenarkan rayuan dengan kos dan kos untuk mahkamah bawahan dan memerintahkan jumlah penghakiman yang telah dibayar kepada responden dikembalikan dengan faedah:

(1) Persoalan yang perlu ditentukan dalam rayuan ini sama ada defendan pertama di dalam mengukuhkan fakta-fakta yang tidak dipertikaikan seperti dibayangkan oleh pihak-pihak di dalam afidavit-afidavit yang difailkan, membangkitkan sebarang isu-isu untuk dibicarakan agar plaintif dihalang dari memasukkan penghakiman terus dibawah A26A. (lihat perenggan 10).

(2) Adalah nyata bahawa defendan pertama telah menggunapakai pilihan di bawah kl 2(a)(i) di atas, iaitu membayar kos baikpulih kereta dan plaintif telah menunjukkan penerimaannya untuk kos baikpulih dengan menguatkuasakan nota penyelesaian (lihat perenggan 12).

(3) Isu-isu yang dibangkitkan oleh defendan pertama secara jelasnya adalah isu-isu yang perlu dibicarakan yang mana sangat tidak sesuai untuk memasukkan penghakiman terus kepada plaintif. (lihat perenggan 13).]

Notes

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3170–3243.

For cases on claims of motor insurance, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 238–239.

Cases referred to

Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors [1996] 5 MLJ 345 (refd)
United Malayan Banking Corp Bhd v Lim Meng Hua & Ors [1990] 1 MLJ 54 (refd)

Legislation referred to

Road Transport Act 1987
Subordinate Courts Rules 1980 O 26A

B Balakumar Balasundram (Azim, Tunku Farik & Wong) for the first defendant/appellant.
WS Goh (WS Goh & Associates) for the plaintiff/respondent.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the first defendant ('the first defendant') against the decision of the learned sessions court judge who had on 7 July 2005 allowed the respondent/plaintiff ('the plaintiff') to enter summary judgment against the first defendant under O 26A of the Subordinate Courts Rules 1980, whereby the first defendant was ordered to pay the plaintiff a sum of RM40,000 as the total value of the motor car bearing registration No. MAP 8856 ('the car'); RM18,000 for loss of use of the car for 90 days; interest on RM58,000; and costs of RM1,387.

[2] The first defendant had on 1 September 2005 paid to the plaintiff a sum of RM63,099 being the total judgment sum.

FACTUAL BACKGROUND

[3] The car was involved in an accident on 7 December 2002.

[4] On 10 December 2002, the first defendant's adjuster assessed the damage sustained by the car.

[5] The plaintiff had on 20 January 2003 executed an agreement with the second defendant, pursuant to which the second defendant repaired the car and delivered it to the plaintiff sometime in May 2003. The plaintiff then executed a satisfaction note, certifying that all repairs to the car rendered necessary due to the accident on or about 7 December 2002 had been carried out to her satisfaction and that the payment made by the first defendant direct to the second defendant covering the cost of such repairs shall constitute a full release of the claim made under Policy No 02DMC/MPE 123033 ('the insurance policy'), in relation to which the first defendant was the insurer and the plaintiff the insured.

[6] On 22 June 2004, the car was examined by Puspakom which stated that the car had not complied with the Road Transport Act 1987 and the rules made thereunder, as the car was suspected of showing signs of dissection and reconnection to the floor and the roof thereof.

[7] On 10 November 2004, the plaintiff filed a claim against the first defendant and averred that the first defendant was under an obligation to repair the car to the

A standard required by the Road Transport Department, or alternatively, to pay to the plaintiff the market value of the car by way of total loss.

SATISFACTION NOTE

B **[8]** First defendant's learned counsel, Mr B Balakumar Balasundram submitted that:

(1) the plaintiff had executed the satisfaction note and so the first defendant had been released from any further liability under the insurance policy; and

C (2) there was a lapse of 13 months from the date of plaintiff's execution of the satisfaction note in May 2003 to the examination of the car by Puspakom on 22 June 2004 and a new registration number had been given to the car. Hence, the first defendant was to be released from any liability after the execution of the satisfaction note.

D **[9]** Mr WS Goh, plaintiff's learned counsel, contended that the first defendant's payment to the plaintiff of the cost of repairs to the car had not released the first defendant from liability under the insurance policy which provides for full indemnity in clause 2 thereof.

E **[10]** In my view, the question for determination in this appeal is whether the first defendant had, on the substantially undisputed facts as alluded to by way of the parties' affidavits filed herein, raised any triable issue so as to bar the plaintiff from signing summary judgment under O 26A (see eg *United Malayan Banking Corp Bhd v Lim Meng Hua & Ors* [1990] 1 MLJ 54 and *Malaysian Assurance Alliance Bhd v* F *Yeam Sai Ming & Ors* [1996] 5 MLJ 345.

[11] In this regard, it is necessary for me to refer clause 2 of the insurance policy which reads:

G Basis of Settlement

(a) We will at our option

(i) pay the cost of repairs to your vehicle, or

(ii) pay in cash the amount of the loss or damage to your vehicle; or

H (iii) reinstate or replace your vehicle.

[12] It is apparent that the first defendant had exercised the option under cl 2(a)(i) above, ie, to pay the cost of repairs to the car and the plaintiff had signified her acceptance of the cost of repairs by executing the satisfaction note.

I **[13]** That being the case, the question whether the plaintiff is entitled to a second bite at the proverbial cherry is an issue which merits a full trial. The issues raised for the first defendant are clearly triable issues which are eminently unsuitable for the signing of a summary judgment in favour of the plaintiff.

[14] Hence, the plaintiffs claim should proceed to trial. I therefore allow the first defendant's appeal with costs here and the court below. I also set aside the summary judgment entered by the learned sessions court judge and order that an early date be given for the full hearing of the plaintiffs claim.

[15] I further order that the plaintiff refund the sum of RM63,099 paid on 1 September 2005 by the first defendant to the plaintiff, with interest from the date of this judgment to the date of realisation.

Appeal allowed with costs.

Reported by Navit Kaur Randhawa